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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1945

No. 460

HOWARD L. KERFOOT, as Administrator of the Goods, Chattels and Credits of MADELINE MEREDITH KERFOOT, deceased,

Petitioner,

—against—

ROBERT H. KELLEY,

Defendant,

—and—

RUTH KELLEY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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Petitioner,

—against—

ROBERT H. KELLEY,

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—and—

RUTH KELLEY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

ARGUMENT

I

The seventh amendment to the Constitution of the United States, respecting the right to trial by jury in suits at common law, relates only to trials in the courts of the United States and has no application to trials in State courts.

In *Walker* v. *Sauvinet*, 92 U. S. 90, this Court said:

> "By Art. 7 of the amendments, it is provided, 'that in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' This, as has been many times decided, relates only to trials in the Courts of the United States. *Edwards* v. *Elliot*, 21 Wall. 557. The States, so far as this amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law pending in the State Courts is not, therefore, a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge. A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the State Courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. *Murray's Lessee* v. *Hoboken L. & I. Co.*, 18 How. 280."

And in *Middleton* v. *Whitridge*, (213 N. Y. 499, at 506, 507), the New York Court of Appeals said:

> "The Seventh Amendment to the Federal Constitution does not limit State action, and so *Slocum* v. *New York Life Ins. Co.* (228 U. S. 364) is not controlling. The provision of the State Constitution guarantees the substantial right of trial by jury, but it contains no language even suggestive of a purpose to preserve ancient common-law forms and rules of procedure."

It is significant that the New York Court of Appeals did not certify, in its remittitur, (R., pp. 44, 45) that any question was involved either under the Federal or State constitutions.

This Court does not undertake to determine whether the procedure in a State court was in accordance with the State law. The final judgment of the State court determines that it was.

United Gas Co. v. *Texas*, 303 U. S. 123.

II

The determination made by the New York State Court of Appeals was strictly within its power and jurisdiction.

Petitioner asserts (p. 3, petition) that by reversing the judgments of the lower courts and dismissing the complaint, the New York Court of Appeals "in effect" substituted a trial by the court in place of a trial by jury, and that the New York Court of Appeals took

to itself "the right of passing upon the probative value, credibility and sufficiency of the evidence," (p. 5, petitioner's brief).

Cases are cited (p. 7, petitioner's brief) to the effect that the credibility of witnesses and the weight and probative value of evidence are to be determined by the jury.

The petitioner not only confuses, but wholly disregards, the distinction between the weight and preponderance of the evidence on the one hand, and the legal sufficiency of the evidence on the other hand. The former presents a question of fact for the determination of the jury while the latter presents solely a question of law for determination by the court.

That "insufficient evidence is, in the eye of the law, no evidence" has been so often reiterated that extended citation of authority is unnecessary.

Matter of Case, 214 N. Y. 199.

In that case the court quoted from prior decisions:

> "When we say that there is no evidence to go to the jury, we do not mean that there is literally none, but that there is none that ought reasonably to satisfy a jury that the fact sought to be proved is established."

The "scintilla of evidence" rule has been rejected in New York. There must be more than a scintilla of evidence to carry an issue to the jury.

Powers v. *N. Y. Central & H. R. R. Co.*, 60 Hun 19, 14 N. Y. Suppl. 408, affd. no opinion 128 N. Y. 659;

Leinkauf v. *Lombard*, 137 N. Y. 417, at 425.

In the case at bar, defendant resided in the State of New York when the action was commenced. (New York Court of Appeals case on appeal, fols. 12, 110). Plaintiff brought suit in the Supreme Court of the State of New York under the provisions of the law of Virginia (R., p. 1) to recover damages for the alleged wrongful death of his wife as a result of an automobile accident in Virginia where the decedent then resided, (R., p. 2).

The decedent was a guest riding in the automobile at the time of the accident (R., p. 2).

The Virginia statute (R., p. 24) provides that:

> "No person transported by the owner or operator of any motor vehicle as a guest without payment for such transportation and no personal representative of any such guest so transported, shall be entitled to recover damages against such owner or operator for death or injuries to the person or property of such guest resulting from the operation of such motor vehicle, unless such death or injury was caused or resulted from the gross negligence or wilful and wanton disregard of the safety of the person or property of the person being so transported on the part of such owner or operator."

Defendant's counsel moved to dismiss on the ground that plaintiff had failed to prove any negligence of the defendant "much less to prove gross negligence" and also on the ground that there was no proof that decedent was free from contributory negligence as alleged in the complaint. The motion was denied and exception taken (R. pp. 23, 24 and New York Court of Appeals record p. 78, omitted in printing, R., p. 46).

The case was permitted to go to the jury which brought in a verdict for the plaintiff (R., p. 39).

On appeal by defendant to the Appellate Division of the New York Supreme Court (the New York intermediate court of appeal) the judgment entered upon the verdict was affirmed, without opinion, but one of the Justices dissented and voted to reverse and to dismiss the complaint (R., p. 40).

This permitted further appeal to the New York Court of Appeals, where the judgments of the lower courts were reversed and the complaint was dismissed (R., pp. 43, 44).

That Court followed the Virginia decisions, defining gross negligence and wanton disregard of the safety of the deceased, (R., p. 42) and held that "the evidence in this case was clearly insufficient to prove gross negligence as defined in the controlling decisions of the highest court in the State of Virginia" (R., p. 43). The court said that "the complaint should have been dismissed," reversed the judgments of the lower courts and dismissed the complaint (R., p. 43).

This did not constitute a ruling on a question of fact, *i. e.*, the preponderance or weight of the evidence, as contended by petitioner. It was a ruling on a question of law, *i. e.*, the insufficiency of the evidence.

The New York State Constitution (Article 6, section 7) limits the jurisdiction of the New York Court of Appeals to the determination of questions of law in civil actions except in the one instance where, the Appellate Division of the Supreme Court (the intermediate court of appeal) makes new findings of its own, in which event the New York Court of Appeals may review such new findings.

The New York Court of Appeals has at all times exercised the right to reverse on questions of law in jury cases.

If as a matter of law a dismissal of the complaint or a direction of a verdict is proper, no constitutional right is invaded by the determination of the cause by the trial justice without taking a verdict of the jury. If in such case the trial justice erroneously submits the case to the jury when he should have dismissed the case because there was no question of fact for the determination of the jury, the Appellate Court is fully authorized to correct the error and to make final disposition of the case in the manner in which the trial justice should have disposed of the case in the first instance, *i. e.*, by dismissing it as a matter of law. Such disposition by the Appellate Court does not violate any constitutional right as no such right ever existed. The error which the Appellate Court thus corrects is the error of the Court and not any error of the jury. "The province of the jury is not invaded by the correction of such an error and the rendition of the judgment which ought to have been rendered by the trial court."

Middleton v. *Whitridge*, 213 N. Y. 499 at 507;

Herrman v. *U. S. Trust Co.*, 221 N. Y. 143;

Bullock v. *N. Y. Central and H. R. R. Co.*, 213 N. Y. 694.

In 1925, the authority of the New York Court of Appeals to render final judgment of dismissal was expressly affirmed by constitutional amendment which provided (Art. 6, sec. 8), that "upon an appeal from a judgment or an order, any Appellate Court to which the appeal is taken which is authorized to review such judgment or order, may reverse or affirm, wholly or in part, or may modify the judgment or order appealed from, and each

interlocutory judgment or intermediate or other order which it is authorized to review, and as to any or all of the parties. It shall thereupon render judgment of affirmance, judgment of reversal and final judgment upon the right of any or all of the parties, or judgment of modification thereon, according to law, except where it may be necessary or proper to grant a new trial or hearing, when it may grant a new trial or hearing."

Under this constitutional authority, the New York Court of Appeals, when reversing on the ground that the evidence is insufficient as a matter of law, is no longer required to send the case back to the lower court for further proceedings. It is not "necessary or proper to grant a new trial or hearing" because no issue of fact remains for trial.

The New York Court of Appeals has the same power to render final judgment as has the Appellate Division of the New York Supreme Court.

Matter of Winburn, 270 N. Y. 196.

The 1925 constitutional amendment merely conferred upon the New York Court of Appeals the authority to make the determination which the Trial Justice should have made.

CONCLUSION.

Petitioner has not shown any ground recognized by this court as the basis for a Writ of Certiorari and his petition should be denied.

October 16, 1945.

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